STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)
	)
DAVID A. KRAEMER,	)
Complainant,	)
	)
and	)**Charge No: 2001CA2463**
	)**EEOC No: 21BA11662**
B.P. MARKETS INC.,	)**ALS No: 11797**
	)
Respondent.	)

RECOMMENDED ORDER AND DECISION

On June 14, 2002, the Illinois Department of Human Rights filed a Complaint on behalf of Complainant, alleging that Respondent discriminated against him on the basis of age in violation of the Illinois Human Rights Act (Act) 775 ILCS 5/1-101 *et seq*. A public hearing was held on the allegations of the charge on September 30, 2003, and October 1, 2003. This matter is ready for decision.

CONTENTIONS OF THE PARTIES

Complainant contends that Respondent unlawfully discriminated against him by discharging him because of his age. Respondent denies that it unlawfully discriminated against Complainant and maintains that it discharged Complainant for legitimate non-discriminatory reasons.

FINDINGS OF FACT

The following facts were determined to have been proven by a preponderance of the evidence. Assertions made at the public hearing that are not addressed herein were determined to be unproven or immaterial to this decision.

1. Complainant was born February 27, 1938.
2. Respondent, B. P. Markets, is a corporation that owns six gas station/convenience stores doing business as T.D Pete's, which it purchased on

September 18, 2000 from Donald McClucky (McClucky). Brian Rogers (Rogers), 39, is President of Respondent and Perry Denault (Denault), 37, is Vice President of Respondent. Rogers is generally responsible for financial operations and Denault is responsible for day-to-day store operations.

3. Complainant had been hired in August 1992 by McClucky as Store Manager of the Nelson Avenue store in Kankakee, Illinois (Nelson store) prior to Respondent's ownership of the store chain.

4. Kathleen Walsh (Walsh) was born February 22, 1962. Walsh is Complainant's daughter. Walsh had been hired in April 1993 by McClucky as an assistant manager and was promoted within her first year of employment to a store manager. Around 1998, Walsh was promoted to Supervisor of the six - store, T.D. Pete's chain.

5. In September, 2000, when Respondent purchased T.D. Pete's, Walsh remained in her position as Supervisor and Complainant remained in his position as Store Manager of the Nelson store. Respondent changed Walsh's position title in October 2000 to Director of Retail Operations; however, her job duties remained the same. Complainant reported directly to Walsh in her positions as Supervisor and Director of Retail Operations. Walsh reported mainly to Denault, but also reported to Rogers.

6. At the time Respondent purchased T.D Pete's, there were two managers aged in their twenties, two in their sixties, one in her forties and one in his fifties.

7. In January 2001, Respondent had fifty-one employees; seventeen were over forty years old and five were over sixty years old.

8. When Respondent purchased the stores from McClucky, Respondent thought the stores were unclean and that they needed improvement in merchandising

and in overall store image. Respondent's plans for the stores were to perform a tremendous amount of cleaning, re-imaging, painting and upgrades.

9. Respondent had regular monthly managers' meetings with the six store managers.

10. Debra Lerch is Store Manager of the Wilmington, Illinois store and has been so for the last ten years. Lerch was retained as Store Manager when Respondent purchased the stores.

11. Throughout his employment under McClucky and Respondent, Complainant was never given a written reprimand or suspended or otherwise disciplined for poor job performance prior to his discharge in January 2001.

12. Respondent had an employee handbook in place titled "Employee Guidelines" and a Training Memo addressing "Disciplinary Action Process" that outlined steps for dealing with disciplinary problems. Neither of these documents specifically addressed disciplinary measures to follow in the event of an employee organizing a "walk out."

13. Between October, and December 2000, Denault asked Complainant twice when he was expecting to retire --once while in the Nelson store when Denault, Rogers and both of their wives were visiting the store; and a second time when Complainant was visiting the company office. During this same time period, Denault also made a similar inquiry to Walsh, asking her if she had knowledge of Complainant's and Mardelle Eades' (Eades) retirement plans.

14. Before Respondent purchased the stores, there was a retirement plan in place for the employees. After Respondent purchased the stores, it changed the employees' retirement plan. The new retirement plan began January 1, 2001, and Respondent invited employees to sign up for it. The new retirement plan required employees to make a contribution from their own paychecks and

included an employer matching contribution; the previous retirement plan under McClucky's ownership was fully funded by the employer and did not require an out-of-pocket contribution by the employees. Many of the managers were not happy with the new plan and expressed their dissatisfaction to Walsh. Complainant was one of the employees who signed up for the plan January 1, 2001.

15. Neither Complainant nor Walsh expressed any concern over the new retirement plan to Respondent.

16. Around January 5, 2001, Complainant and Walsh attempted to arrange a meeting of the store managers outside the presence of and without the knowledge of Respondent. The meeting was scheduled for Monday, January 8, 2001 at 5:00 p.m. in the City of Manteno. Around January 5, 2001, Walsh contacted other managers to arrange the meeting with the purpose of orchestrating a walkout to protest the new retirement plan.

17. Around January 5, 2001, Lerch received a telephone call from Walsh. Lerch contacted Wade Hedford, a non-manager co-worker and friend, and discussed her understanding that a manager walkout was being organized and sought his advise on whether she should alert Denault and Rogers. Lerch then contacted Denault and informed him that she had information that a walkout was being organized. Lerch requested that Denault keep the source of the information she had relayed confidential.

18. On January 6, 2001, a Saturday, Denault received a telephone call from Lerch. Based upon information received from Lerch, Denault believed that Walsh and Complainant were organizing the other store managers to stage a walkout.

19. Respondent had previously scheduled a managers' meeting for early Monday morning, January 8, 2001.

20. On January 8, 2001, Denault informed Rogers that he was aware that Complainant and Walsh were planning a meeting with the other store managers for five o'clock that evening in order to stage a company walkout. After hearing this, Rogers made the decision that Walsh and Complainant were to be immediately discharged. Rogers prepared termination letters that day for Complainant and Walsh. Walsh was 39 at the time; Complainant was 62. Respondent summoned Complainant and Walsh to the company office around 9:00 a.m. and discharged them both.

21. At the time Complainant was discharged, Respondent had no replacement in mind for his position.

22. Respondent replaced Complainant as Store Manager of its Nelson Avenue store with Stewart Wagner (Wagner), age 50 years old. Wagner was Store Manager of the River Street store and was transferred to replace Complainant at the Nelson store. Tammie Rawlings, 37, was the Assistant Manager of the River Street store and was promoted to Store Manager to fill Wagner's position at the River Street store.

23. Eades was initially employed in 1984 in the Brookmont store as sales associate, became an assistant manager around four years later and became store manager around 1991-1992. After Respondent became the owners, Eades remained as store manager from September 2000 until February 2001. Eades then took a position as a sales associate until November 26, 2002. At the time of this hearing in October 2003, Eades is 67 years old.

24. In early January 2001, Eades was contacted by Walsh, who invited her to a meeting for the managers to organize a walkout.

CONCLUSIONS OF LAW

1. The Illinois Human Rights Commission has jurisdiction over the parties to and the subject matter of the Complaint.
2. Complainant has proven, by a preponderance of the evidence, a *prima facie* case of unlawful discrimination based upon age.
3. Respondent articulated a legitimate, non-discriminatory reason for its actions.
4. Complainant has not established, by a preponderance of the evidence, that Respondent's proffered reason was a pretext for unlawful discrimination.

DETERMINATION

Complainant has failed to establish, by a preponderance of the evidence, that Respondent discharged him because of his age.

DISCUSSION

A Complainant bears the burden of proving discrimination by a preponderance of the evidence, in accordance with the Act at 775 ILCS 8A-102(I). Typically, in cases alleging age discrimination, the Commission has applied a three-step analysis to determine whether there has been a violation of the Act in accordance with the method set out in **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 93 S.Ct. 1817 (1973) and **Texas Dept. of Community Affairs v. Burdine,** 450 U.S. 248, 101 S. Ct. 1089 (1981). This method of proof has been approved by the Illinois Supreme Court and adopted by the Commission in **Zaderaka v. Illinois Human Rights Commission**,131 Ill.2d 172, 545 N.E.2d 684 (1989).

Under this three-step approach, a complainant must first establish a *prima facie* case of unlawful discrimination. Then the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action. Once respondent successfully makes this articulation, the presumption of unlawful discrimination drops and the complainant is required to prove, by a preponderance of the evidence, that the

respondent's articulated reason is a pretext for unlawful discrimination. **McDonnell-Douglas v. Green**, *supra*. The latter requirement merges with the complainant's ultimate burden of proving that the respondent unlawfully discriminated against complainant. **Burdine**, *supra*.

Age Discrimination

In an age discrimination case based on discharge, the ultimate burden on the Complainant is to prove that a discharge was based on age. **Castleman and Freeman United Coal Mining Co.,** 34 Ill. HRC Rep. 110 (1987); **LaMontagne v. American Convenience Prod., Inc**., 750 F.2d 1405 (7th Cir. 1984); **Columbus v. Prudential Insurance Co. of America**, 688 F.2d 547 (7th Cir. 1982). To establish a *prima facie* case of age discrimination, Complainant must prove, not that age was the sole factor motivating the employer's discharge decision, but rather that age was a "determining factor," in the sense that he would not have been discharged "but for" the employer's motive to discriminate against him because of his age. **Loeb v. Textron, Inc**., 600 F.2d 1003 (1st Cir. 1979). The complainant may meet this burden directly by presenting direct or circumstantial evidence that age was a determining factor in the discharge. See, **Troupe v. The May Depart. Stores Co.**,20 F.3d. 734 (7th Cir. 1994); **Olson and Votainer USA Inc**., __ Ill HRC Rep. __, (1993CF3193, April 29, 2002); **Burke and Catholic Social Service**, __ Ill HRC Rep. __, (1993SF0534, March 20, 1997). Complainant may also prove his case indirectly pursuant to the traditional analysis set forth in **McDonnell-Douglas Corp. v. Green,** *supra*, and its progeny.

Direct evidence

Direct evidence usually consists of statements by the employer which explain or reveal the employer's discriminatory motives and can consist of any facts that make it more likely than not that the employer's actions were motivated by unlawful

discrimination. Such facts would require Respondent to articulate a legitimate reason for its actions. **Mott and City of Elgin**, __ Ill. HRC Rep. __ (1986 CF 3090, June 30, 1992). Complainant attempts to demonstrate direct evidence of age discrimination through evidence of alleged statements showing discriminatory animus. Complainant testified that approximately two weeks after Respondent had purchased the store chain, Denault, Rogers and their wives were in the Nelson Avenue store when Denault asked Complainant, "when are you going to be retiring, Dave?", to which Complainant replied "Perry, you got me for two years, until I'm 65." Complainant also described a conversation he had with Denault in Denault's office during November or December, 2000, when Denault asked Complainant if he had decided when he was going to be retiring, to which Complainant responded "Perry, I told you, you got me for two years; I intend to stay until I'm 65."

Walsh testified that sometime at the end of October or beginning of November 2000, Denault asked her what were Complainant's and Eades' plans for retirement for their respective futures. Walsh responded that she was sure Complainant was not planning to retire until he was 65 and that she would find out what Eades' plans were. Walsh later talked to Eades and Complainant about their respective retirement plans and reported their responses back to Denault. Denault denies both conversations with Complainant and the conversation with Walsh regarding Complainant's and Eades' retirement plans. Notwithstanding Denault's denial, I find Complainant's and Walsh's testimony as to the inquiries detailed and credible.

Complainant contends that these age-related inquiries by Respondent, when taken along with the timing of his discharge, create an inference of discriminatory intent. However, the circumstances of merely inquiring about an employee's retirement plans do not rise to support a direct inference of age discrimination, especially under these conditions, where the inquirer had just recently purchased the business and was in the

process of developing plans for its future and restructuring the company retirement plan. From Complainant's account, Denault inquired of him once while in the Nelson store when Denault, Rogers and both of their wives were visiting the store; a second time when Complainant was visiting the company office; and a third time when Denault made the same inquiry to Walsh. Even though Denault inquired of Complainant's retirement plans three separate times, there was no evidence presented of anything in Denault's specific language, demeanor or conduct from which to infer a plan to threaten, coerce or bully Complainant into retirement. Further, Respondent offered a new retirement plan to begin January 1, 2001, and invited the employees to sign up for it. Complainant was one of the employees who signed up for the plan. It is difficult for me to believe that Respondent would have allowed Complainant to sign up for the retirement plan when it was planning to discharge him a week later. The more prudent course of conduct would have been for Respondent to discharge him before the new retirement program was scheduled to begin. For these reasons, Complainant's *prima facie* showing by direct means fails.

Indirect evidence

Complainant further argues that he has established a *prima facie* case of age discrimination by the indirect method. This method requires the Complainant to prove that 1) he is a member of the protected class of persons over 40 years of age; 2) he was performing his job well enough to meet the employer's legitimate expectations; 3) there was an adverse job action taken; and 4) he was replaced by a younger employee. See, **O'Conner v. Consolidated Coin Caterers Corp.**, 116 S.Ct. 1307 (1996); **Anderson v. Illinois Human Rights Commission**, 314 Ill.App.3d 35, 731 N.E.2d 371, 246 Ill. Dec 843 (1st Dist. 2000); **Stone and Bourn and Koch Machine Tool Co.**, __ Ill HRC Rep. __,(1993CA1390, July 24, 1998); and **Altes v. Illinois Dept. of Employment Security**, 50 Ill. HRC Rep. 3 (1989).

The first and third elements of Complainant's *prima facie* case are undisputed. Complainant was 62 years old at the time he suffered the adverse job action of discharge. As to the second element, Respondent argues that Complainant was not performing his job duties satisfactorily. Although there was sufficient evidence presented that Complainant's store was dirtier than the other stores, that Complainant regularly failed to clock his work hours in and out and that Complainant's personal appearance was not clean shaven and neat in appearance, Rogers testified that Complainant's discharge was not based on any failure to adhere to the general work policies and Respondent admits that it never reprimanded or otherwise disciplined Complainant for any work performance infractions. Since the record supports that Complainant's job performance was not a factor in his discharge, the inference is that Complainant was performing his job duties satisfactorily. Therefore, Complainant has satisfied the second element.

In addressing the fourth element, it is undisputed that Complainant was replaced by Stewart Wagner, age 50. Although Complainant's replacement is, too, within the protected class of persons at least age 40, the Commission follows the analysis in **O'Conner**, where the U.S. Supreme Court stated, "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." **O'Conner**, *supra*. Hence, the fourth element is demonstrated, and Complainant has put forth a *prima facie* case of age discrimination.

Respondent's articulated reason

Respondent maintains that it discharged Complainant for poor performance, inability to follow company guide lines, not showing desire to improve an inefficient operation and because Complainant was organizing a walkout of company managers.

Complainant's showing of pretext

On its face, Respondent's articulation provides a neutral, non-discriminatory reason for Complainant's discharge. Thus, the question remaining is whether Complainant has shown by a preponderance of the evidence that Respondent's articulation is a pretext for age discrimination. On this showing, Complainant fails.

A Complainant may establish pretext by showing either that (1) the employer's explanations are not worthy of belief; (2) the proffered reason had no basis in fact; (3) the proffered reason did not actually motivate the decision; or (4) the proffered reason was insufficient to motivate the decision. **Grohs v. Gold Bond Prod.**, 859 F.2d 1283 (7th Cir. 1988), **Burnham City Hospital v. Illinois Human Rights Commission**, 126 Ill.App.3d 999 (4th Dist. 1984).

Complainant credibly testified that he and Walsh had attempted to arrange a meeting of the store managers outside the presence of and without the knowledge of Respondent. Complainant testified that the meeting was scheduled for Monday, January 8, 2001 at 5:00 p.m., in the City of Manteno and "The discussion of the meeting was to be Mr. Denault's or Mr. Rogers' response to our questions of why we did not get our raise." Complainant further testified that he could not recall whether he made telephone calls to any other managers to recruit them to attend the meeting; however he admitted that the meeting was his idea, that he was aware that the meeting was being arranged, and that he was an organizer of the meeting.

Although Walsh denied she had any knowledge of the existence of the arrangement of the January 8, 2001, 5:00 p.m., meeting, she admits that she had initially attempted to organize a meeting with the managers where the managers could express their concerns over the new retirement program; however, Walsh contends that meeting was never finalized. The credibility of Walsh's testimony on this issue is outweighed in

light of the testimony by Complainant that he and Walsh were the organizers of the January 8, 2001, 5:00 p.m., meeting and by the testimony of Eades and Lerch. Eades testified credibly that she was contacted by telephone by Walsh in early January and invited to a meeting. Eades described the purpose of the meeting as "They were trying to get the managers to get together and walk out on the guys and leave them high and dry." Eades' testimony concerning the arrangement of a meeting by Walsh was corroborated by Lerch. Lerch credibly testified that she, too, received a telephone call from Walsh the weekend of January 5th, 2001, inviting her to a meeting, after which Lerch made telephone calls to Wade Hedford, a non-manager co-worker at the time, and then to Denault in order to alert Denault to information she had that a meeting was being arranged to "stage a walk out on Brian [Rogers] and Perry [Denault]." Lerch further credibly testified that she requested that Respondent keep the source of the information she had relayed confidential.

The proximity of Complainant's discharge to Respondent's knowledge of the January 8, 2001, 5:00 p.m. meeting cannot be ignored. Denault became aware on Saturday, January 6, 2001, through a telephone call from Lerch that Complainant and Walsh were organizing a meeting of the managers. Denault understood that the purpose of the meeting was to organize a walkout of the store managers. Denault discussed this meeting with Rogers around 8:00 a.m. the following Monday, January 8, 2001, just prior to Respondent's regularly scheduled managers' meeting set to begin at 10:00 a.m. Denault understood that Complainant and Walsh were organizing a managers' meeting for 5:00 p.m. that evening. Prior to the alert by Lerch, neither Rogers nor Denault had been aware of the meeting. Rogers told Denault that they were going to discharge Complainant and Walsh "right now." Respondent called Complainant and Walsh and requested each to come in the office prior to Respondent's scheduled managers' meeting. Respondent summoned police to be present, prepared termination letters for

both of them and discharged them when they arrived. Respondent did not give Complainant and Walsh a reason for their respective terminations at the time because it had received information of the secret meeting from a current manager, Lerch, and Lerch had requested that Respondent keep the source of the information confidential.

Although Respondent spent much time during the public hearing putting on evidence of Complainant's alleged poor job performance, Rogers testified that Complainant's "termination was based upon his actions of the weekend prior to him getting terminated" -- a clear reference to Complainant's conduct at attempting to organize a meeting to plan a walkout. It is clear from the record that Complainant's job performance had little, if anything, to do with his discharge. However, there is ample evidence in the record to support that Complainant's action in organizing a "walkout meeting" is the reason underlying his discharge and Complainant has failed to demonstrate this reason is a pretext for age discrimination, thus Complainant's pretextual showing fails.[1]

RECOMMENDATION

Based on the foregoing, I recommend that the Complaint and the underlying Charge be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

By:_____
SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section

ENTERED: February 25, 2004

[1] The implication of Respondent's conduct under the National Labor Relations Act is not before me, and this opinion shall not be construed as passing upon that question.